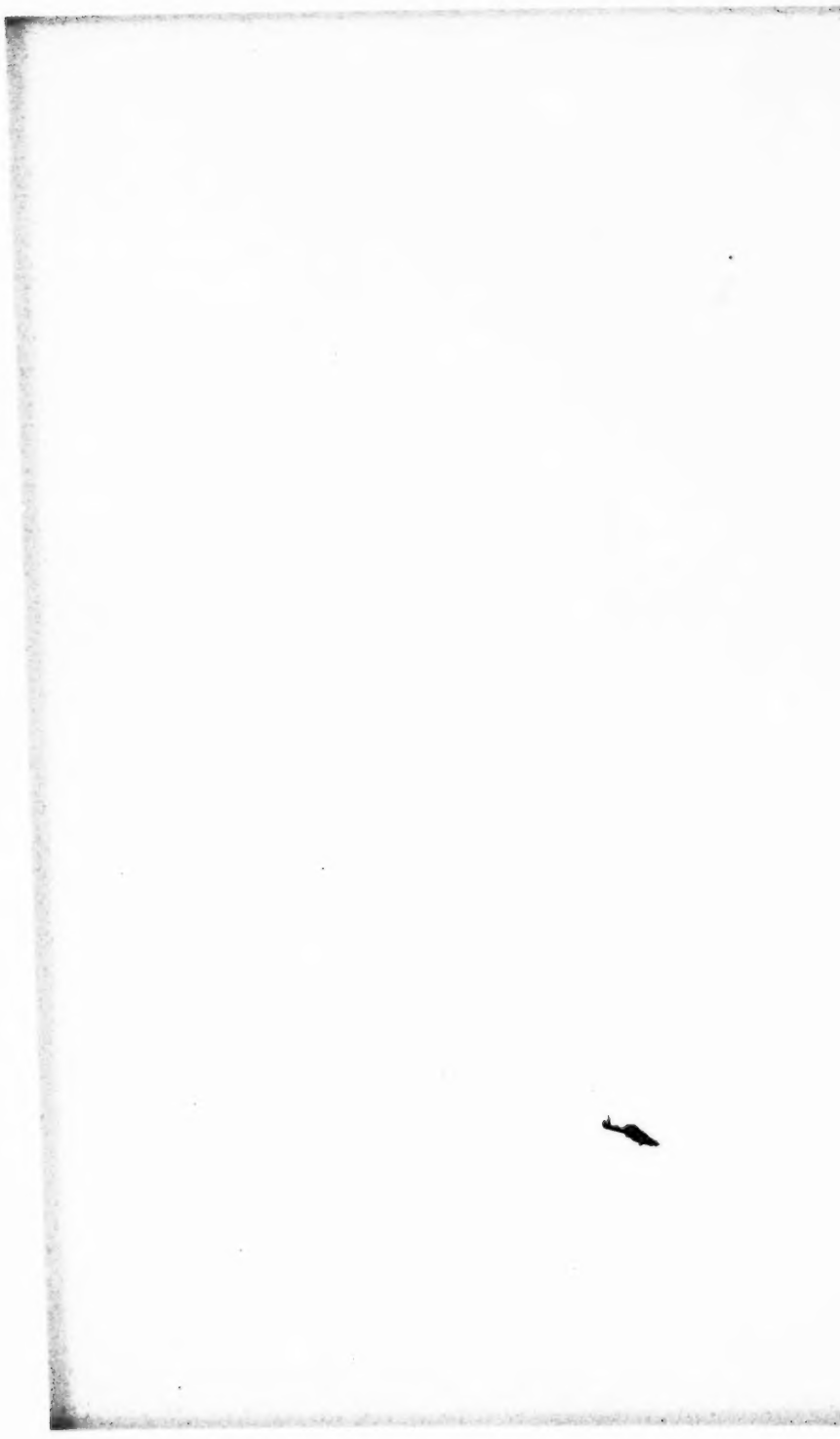


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE,
Petitioner,

v.

CONSUMERS UNION OF UNITED STATES, INC., *et al.*,
and
COST OF LIVING COUNCIL, *et al.*,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Respondents Consumers Union of United States, Inc., Senator William D. Hathaway and Peter J. Petkas, respectfully oppose the Petition for Writ of Certiorari for the reason that the decision of the Court below fully and adequately disposes of this case and there are no special and important reasons for granting the writ.

STATUTORY PROVISIONS INVOLVED

Economic Stabilization Act of 1970, as amended:

"Section 205. Public Disclosure." – [87 Stat. 28-29]

While Petitioner accurately sets forth the full text of Section 205 of the Economic Stabilization Act, as amended ("Section 205"), it inexplicably cites the former title to that Section – "Confidentiality of Information"[1] – which was discarded by Congress in the April 30, 1973 amendments to the Act. The new (and current) title – "Public Disclosure" – was adopted along with the 1973 amendments, which greatly increased the amount and type of data required to be disclosed.[2]

"Section 211. Judicial Review – [85 Stat. 749]

(b)(2) Except as otherwise provided in this Section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

"Section 218. Extension of Act – [87 Stat. 29]

Section 218 of the Economic Stabilization Act of 1970 is amended by striking out "April 30, 1973" and "May 1, 1973" and inserting in lieu thereof "April 30, 1974" and "May 1, 1974," respectively."

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[1] Petition for Writ of Certiorari, p. 3, ("Petition").

[2] PL 93-28, April 30, 1973.

United States Code, Title 18:

"Section 1905 [62 Stat. 791] Disclosure of confidential information generally.

Whoever, being an officer or employee of the United States or of any agency or department thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any *** report or record made to or filed with such department or agency *** shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

STATEMENT

Petitioner's statement is generally adequate, and Respondents rely thereon except in two respects. *First,* Petitioner notes that the Cost of Living Council ("the Council") in its public disclosure regulation, "expressed some doubt" that Section 205 survived Phase 3. Petition, p. 6. Petitioner fails to add that the Council resolved whatever "doubt" it had by applying Section 205 to Phase 4 quarterly reports.

Second, events now confirm that Respondents did indeed exhaust their administrative remedies. By letter dated March 1, 1974, Consumers Union renewed its earlier request to Executive Director of the Council, John T. Dunlop, a defendant in this case, to promptly act on plaintiffs' administrative appeal. On March 11, 1974, Attorney Amanda Peterson, of the Council's Office of General Counsel, telephoned counsel for Respondent Consumers Union to state that Dr. Dunlop had, on the basis of the District Court ruling, denied the administrative appeal in a letter dated November 14, 1973.

Apparently, this letter was never received. The Council has now provided Respondent Consumers Union with a copy of the November 14 letter. The texts of both letters are attached hereto as the Appendix.

THERE IS NO BASIS FOR GRANTING THE WRIT

Petitioner's thirty-five page brief contains less than three pages which address the only substantive issue in this case – the construction of Section 205.[3] The argument presented in those three pages is not an argument on which the Council relied in its public disclosure regulation ("the Regulation"), nor was it an argument relied upon by the Government in the Courts below. Finally, Petitioner's *sole* substantive argument utterly fails to address the arguments which Respondents successfully advanced in the Temporary Emergency Court of Appeals ("the Emergency Court") but, rather, asks this Court to undertake the very balancing of interests which the Emergency Court holds to be "public policy considerations within the usual province of the Congress".[4] Thus, if this Court grants certiorari it would – because the Government, which in the Courts below relied on arguments of statutory construction, has foregone judicial review – be presented with an essentially different case from that decided below.

It is also significant that the Economic Stabilization Act is temporary legislation which, under the terms of Section 218 of the Act, as amended, expires on May 1, 1974, and it is not clear at this time that the Congress will extend the Act beyond that date. Thus, this case may not present

[3] Petition, pp. 33-35.

[4] Petition, Appendix G, p. 54a.

a matter of future significance. Further, legislation now pending, including Senate Bills S. 2961, 3148 and 3032, give the Congress the opportunity to reverse the Emergency Court's decision if they do not agree with it or wish to change Section 205 as a matter of policy.

Petitioner here raises for the first time issues which neither Petitioner nor the Government raised at any point in the lower Court proceedings[5] – issues of standing, ripeness, and exhaustion of administrative remedies. Of these, only the exhaustion issue was considered by the Emergency Court (and that, *sua sponte*), and it had no difficulty in determining that none of the policy reasons for exhausting administrative remedies applies to this case, which involves a single issue of statutory construction.[6] The standing and ripeness issues, except in extraordinary circumstances neither demonstrated nor existing here, may not be raised on appeal, much less before this Court, where they have not been raised at trial. *E.g., U.S. v. New York Tel. Co.*, 326 U.S. 638, 650n (1946); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Corrigan v. Buckley*, 291 U.S. 323, 329 (1926).

Petitioner establishes no "special and important" reasons for granting review, as required by Rule 19 of this Court. Nor can any such reasons be discerned. Indeed, if one existed, the Government surely would not have chosen to forego further judicial review.

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[5] Although Petitioner was an intervenor below, it fully participated in all briefing. Hence, Petitioner had ample opportunity to raise these issues either on motion for summary judgment in the District Court or on appeal in the Emergency Court.

[6] Petition, Appendix G, pp. 45a-48a.

This is a federal question of first impression which has been reviewed and disposed of by a special Court having exclusive primary appellate jurisdiction over the kind of substantive issue presented here.[7] Thus, no conflict among the appellate courts has occurred or, indeed, is possible even.

The only issue presented is a simple, routine one of statutory construction. No special expertise is needed to resolve it. No balancing of competing interests or considerations is required.

The Emergency Court held that the Council has "no reasonable explanation" which could relate the Regulation to the requirements of the statute, that the Council's position is "an anomaly", and that the Council has arrogated to itself *complete* administrative discretion where Congress has foreclosed *any* such discretion.[8] Therefore Petitioner raises no complex or novel questions of federal law and, hence, no reasons why this Court should grant certiorari.

RESPONDENTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The Emergency Court raised the question of exhaustion of administrative remedies *sua sponte* in its January 11, 1974 decision. Neither defendant had raised the issue either at trial or on appeal. The Court had no difficulty in deciding that plaintiffs were excused from pursuing further administrative remedies. In view of the *Corrigan, Hormel* and *New York Telephone* cases, *supra,* it is doubtful that

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[7] PL 92-210, Section 211(b) (2), 85 Stat. 749.

[8] Petition, Appendix G, pp. 54a-55a.

Petitioner can raise the issue here for the first time. In any event, as noted above,[9] recent events make clear that this issue was rendered moot by the Council's November 6 denial of the administrative appeal, which probably accounts for the Council's failure to raise the issue.

SECTION 205 APPLIES TO PHASE 4, AND PETITIONERS MAY NOT RAISE THIS QUESTION FOR THE FIRST TIME ON APPEAL

Petitioner belatedly contends that Section 205 does not apply to Phase 4 of the Economic Stabilization program. This question was raised for the first time by the Government before the Emergency Court in its petition for rehearing subsequent to that Court's decision in this case. The Emergency Court denied the petition for rehearing without passing on this issue.

Under the doctrine stated in the *Corrigan, Hormel* and *New York Telephone Co.* cases, *supra,* it is doubtful that either defendant can properly raise this issue for the first time on appeal. And, in any event, the contention has no underlying basis, because the statute does not purport to terminate its application on the basis of a change in the Stabilization Program initiated by the executive.[10] Additionally, the Council, – whatever doubts it may have expressed about this question in the preamble to the Regulation

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[9] *Supra,* p. 3 and Appendix.

[10] The statute refers to a Council Phase 3 regulation. This reference is obviously for the purpose of identifying the specific Council records (*i.e.*, quarterly reports required by the cited regulation) in which the potentially disclosable information or data is to be found.

– clearly provided in the Regulation for application of Section 205 to Phase 4 information and data in a manner completely identical to Phase 3 application. The preamble clearly refers to the Regulations as being promulgated:

> *in accordance with the requirements imposed on the Council by Section 6 of the Economic Stabilization Act Amendments of 1973.* (Emphasis supplied.) [11]

In fact, the Council wrote the Phase 4 disclosure regulations under the impression – albeit a mistaken one – that Council officials could be subjected to criminal penalties provided for in Title 18 U.S.C., Section 1905 [12] if they interpreted Section 205 in favor of disclosure. The Government relied substantially upon this supposed stricture while defending in the Courts below the Council's narrow interpretation of Section 205. It was not until the Emergency Court rendered its opinion that the Council was relieved of this concern. [13] It is, therefore, highly unlikely that – as Petitioner contends – the Council thus concerned with possible criminal sanction, would write regulations requiring disclosure of *any* nonpublic corporate data relating to Phase 4 if it had found that Section 205 did not require disclosure. Petitioner's proposition in this regard is unfounded.

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[11] Petition, Appendix C, p. 20a.

[12] Making punishable by fine and imprisonment unauthorized disclosure by a government official or employee of confidential information "except as otherwise provided by law".

[13] The Emergency Court held that Section 1905 did not apply to the Council's regulation writing functions. Petition, Appendix G, p. 55a.

PETITIONER MAY NOT RAISE STANDING ISSUES IT FAILED TO RAISE BELOW AND, IN ANY EVENT, PLAINTIFFS' STANDING IS CLEAR

Petitioner's challenge of Plaintiffs' standing to maintain this action is clearly no more than an afterthought. Neither Petitioner nor the Government having raised this issue despite previous opportunity in the District and Emergency Courts, this Court will not entertain such a belated challenge. *U.S. v. New York Telephone Co., Hormel v. Helvering, Corrigan v. Buckley, supra.*

It is clear, in any event, that Plaintiffs have standing to sue. It is true that direct injury or adverse effect must be alleged in order for a party plaintiff to have standing. But Petitioner's own Statement recites both the allegations of interest (in the amended complaint) and the Council's denial of the statutory rights claimed by Plaintiffs. [14] This meets the requirements of both *Sierra Club v. Morton,* 405 U.S. 727 (1972) and *U.S. v. SCRAP,* ____ U.S. ____, 37 L.Ed. 2d 254 (1973). [15]

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[14] Petition, pp. 7-9, 10.

[15] See Petition, pp. 31-32. Petitioner apparently reads the *SCRAP* case – erroneously – as requiring identification of specific products and services for which consumers will pay higher prices as a result of agency action. But *SCRAP* was an Interstate Commerce Commission rate case. Here, the right granted by law is access to information and the most direct injury measureable is denial of access to that information. This injury has been alleged and is legally identical to the higher product prices alleged in *SCRAP.*

THE COURT BELOW PROPERLY OVERTURNED THE UNLAWFUL ADMINISTRATIVE INTERPRETATION OF THE STATUTE

The Emergency Court held that in Section 205, as amended, Congress used *mandatory* language requiring the Council not to define as "excludable from public disclosure data or information" meeting the test set forth in Section 205 (b) (3) of the Act, as amended. The Council, nevertheless, based its regulation on a rationale which would permit it to "avoid completely the effect of this provision of the statute . . .". This the Emergency Court described as "an anomaly". [16]

Petitioner argues that, "[a]ssuming the existence of" such a mandate, the Council "must nevertheless be permitted to determine what information reported to it falls within this nondiscretionary mandate". [17] This argument is fatally illogical, and would place the Council in precisely the position that Congress, according to the Emergency Court, prohibited the Council from assuming. For if an agency has the unreviewable authority to exercise discretion in interpreting a mandate which the Congress has placed upon it, there is no mandate, but a grant of discretion.

Petitioner also relies heavily on highly selected portions of the legislative history to support its proposition that the Court should not have overturned the regulation. [18] However, as the Emergency Court noted in its opinion,

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16 Petition, Appendix G, pp. 54a-55a.

17 Petition, p. 13.

18 Petition, pp. 14-19.

and as all parties agreed below, that history is ambiguous. It fails to illuminate the issue involved in this litigation. [19]

Petitioner would buttress its contention with a number of irrelevant cases [20] holding that the courts should defer to agency expertise in construing the application of a statute. But all of these involved the employment of agency expertise in applying a statute to a set of facts surrounding one or more business transactions. They do not involve, as is the case here, initial construction of a statutory phrase to determine whether the agency's interpretation of the phrase has deprived the provision of its basic meaning and thrust. As the Emergency Court held, the problem here is not the application of the Regulation but the comparison of the Regulation with the statute. [21]

Transformation of the Congressional mandate into an unfettered grant of discretion is not the only anomaly presented by the Council's regulation. The requirement (as a standard for disclosure of data under Section 205) that Council data be numerically identical to SEC data creates additional challenges to good logic and law, as well.

This requirement would suppose that Congress used the *annual* SEC reports as a standard for measuring disclosure of *quarterly* data submitted to the Council, even though the time difference of the reporting periods would render all quarterly data different and thus undisclosable. And it

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[19] Petition, Appendix G, pp. 52a-53a.

[20] *Perkins v. Matthews*, 400 U.S. 379, 391 (1971); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970); *Federal Trade Commission v. Texaco*, 393 U.S. 223, 226 (1968); *Udall v. Tallman*, 380 U.S. 1, 4, 16 (1965), cited at Petition, p. 14.

[21] Petition, Appendix G, p. 47a.

would suppose that Congress, in order to discourage excessive price increases, provided for possible disclosure of only such data as is already available from SEC reports. These propositions – which are inherent in the Council's regulations – are on their face unsupportable.

PETITIONER'S SUBSTANTIVE ARGUMENTS RAISE ISSUES WITHIN THE PROVINCE OF CONGRESS, NOT THE COURTS

The gravamen of Petitioner's narrow substantive argument is that if Section 205 is applied as construed by the Emergency Court, information that will be made public which will permit competitors of disclosing firms to obtain information otherwise unavailable. This, Petitioner argues, is unfair "to the competitive business system". [22]

As the Emergency Court has already held, balancing considerations favoring public disclosure with those favoring secrecy ". . . are public policy considerations within the usual province of Congress". [23] And yet it is clear that Petitioner's sole argument regarding construction of the statute asks this Court to reverse the Emergency Court decision by engaging in a judicial balancing of these competing interests – notwithstanding that Congress has already engaged in the balancing process and spoken in a clear mandate. The Emergency Court properly held that this is a decision for the Congress, and that the Regulation has violated that decision.

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[22] Petition, pp. 33-35. The "unfairness", presumably, is that it will invite competition.

[23] Petition, Appendix G, p. 54a.

CONCLUSION

Because the mandate of the Emergency Court has been stayed pursuant to Section 211 (f) (85 Stat. 750) of the Act, Respondents respectfully pray that the Court expeditiously deny the Petition.[24]

Respectfully submitted,

ALAN MARK SILBERGELD,

PETER H. SCHUCK,

1714 Massachusetts Ave., N.W.
Washington, D.C. 20036

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Consumers Union et al.

Of Counsel:

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1625 I Street, N.W.
Washington, D.C. 20005

March, 1974

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[24] The Government has stated that it will not file a brief in this matter (although a short statement will be lodged with the Court). It is, therefore, requested that the briefs be distributed upon the filing of this brief, in accordance with paragraph 3 of Rule 24.

APPENDIX

Correspondence Relating to Administrative Appeal

ECONOMIC STABILIZATION PROGRAM
COST OF LIVING COUNCIL
WASHINGTON, D.C. 20508

Executive Secretariat

March 14, 1974

Mr. Mark Silbergeld, Esq.
Consumers Union
1714 Massachusetts Avenue, N.W.
Washington, D. C. 20036

Dear Mr. Silbergeld:

The Cost of Living Council is in receipt of your letter of March 1, 1974, requesting a decision on the appeal you filed with the Council from a decision rendered October 19, 1973, by Assistant Director for Public Affairs Richard Lukstadt. Your appeal was considered and a letter informing you of the decision thereon was mailed to you on November 14, 1973. Unfortunately, this letter apparently went astray and, therefore, I am enclosing a copy of it.

Sincerely,

/s/ Henry H. Perritt, Jr.
Henry H. Perritt, Jr.
Executive Secretary

Enclosure

CC: Honorable Charles McC. Mathias
William C. White, Esquire, Department of Justice
John G. DeGooyer, Esquire

A-2

Nov. 14, 1973

Mark Silbergeld, Esq.
Consumers Union
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Silbergeld:

Reference is made to your letter of November 6, 1973, in which you appeal the decision made by Mr. Lukstat not to reveal certain information you requested.

Cost of Living Council regulations define the information you requested as proprietary, i.e., not subject to public disclosure (6 C.F.R. 102.55). These regulations were promulgated, pursuant to Section 205 of the Economic Stabilization Act of 1970, as amended, after careful consideration and deliberation. Further, the regulations at issue were challenged in Consumers Union et al. v. Cost of Living Council et al. (Civil Action 1426-73) and upheld by the Court on November 2, 1973 in a summary judgment proceeding.

Therefore, after careful consideration of all available evidence, your appeal must be, and is, denied.

Sincerely yours,

John T. Dunlop
Director

CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS

Washington Office:
1714 MASSACHUSETTS AVENUE, WASHINGTON, D. C. 20036
202-785-1906

March 1, 1974

Dr. John T. Dunlop
Cost of Living Council
Washington, D.C. 20508

Dear Dr. Dunlop:

On November 6, 1973, we filed with you an appeal from a decision rendered October 19, 1973, by Assistant Director for Public Affairs Richard Lukstadt. Our appeal, at this writing, is almost four months old. A decision would be appreciated.

Mr. Lukstadt, in his October 19 letter to us, denied to us access to certain corporate data from quarterly reports contained in the Council's records. We requested the data under the provisions of the Freedom of Information Act in a letter to Mr. Lukstadt dated August 17, 1973. This data is made subject to public disclosure under the provisions of Section 205 of the Economic Stabilization Act, as amended. See Consumers Union v. Cost of Living Council, ___ F.2d ___, Temporary Emergency Court of Appeals, No. DC-17, January 11, 1974, reh den. Feb. 4, 1974, in which you are a named defendant.

Since Senator Mathias has held hearings on the procedures utilized at the Council, including the administrative appeals procedure, and has a continuing interest in

this matter, I am taking the liberty of providing him with a copy of this request.

Sincerely,

/s/ Mark Silbergeld
Mark Silbergeld

cc: Hon. Charles McC. Mathias
William C. White, Esq., Dept. of Justice
James Elkins, Esq., Dept. of Justice
John G. DeGooyer, Esq.